Cheong Voon Han v Thevan a/l Subramaniam & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-173–11 OF 2017
MOHAMAD SHARIFF JC
26 SEPTEMBER 2018

Tort — Negligence — Damages — Appeal against quantum of damages awarded by sessions court judge — General and special damages — Whether damages awarded by sessions court manifestly low and without due consideration on injuries suffered by victim

This was an appeal regarding the quantum of damages awarded by the sessions court in favour of the appellant which was manifestly low and without due consideration on the injuries suffered by the victim. The appellant claimed against the respondent for general and special damages due to the respondent's negligence in handling a motorcar by way of driving at high speed who had subsequently hit the appellant while he was crossing the road. Parties agreed that the liabilities between the parties were at 50-50. The sessions court had allowed the quantum on 100% basis.

Held, allowing the appeal:

(1) In respect of severe head injury with multiple intracranial haemorrhage and psychosis post traumatic brain injury, there was nothing in the judgement of the sessions court judge which showed that the sessions court had considered the seriousness of the injuries sustained by the appellant. In considering the various injuries and disabilities, the court therefore substituted the award with the amount of RM200,000 from the RM47,000 that was awarded by the sessions court judge (see paras 9–11).

(2) The sessions court judge did not award anything on loss of consciousness and retrograde amnesia. Having referred to the *Revised Compendium of Personal Injury Awards*, the court was of the view that the award of RM5,000 would be fair and justifiable. The sessions court judge also did not award anything on the erectile dysfunction suffered by the appellant. The court in considering this issue took into account that the appellant had six children and was able to have sexual intercourse with his wife before the accident. In view of the accident, the appellant's sexual activity was restricted. The chances of getting child would be diminished, it would definitely affect the quality of life and the negative psychological impact on the family. The court therefore awarded RM30,000 for erectile

dysfunction (see paras 12–13).

(3) The neorogenic bladder and constipation negative impact to the appellant in which the appellant would have problem to perform any work. This had also caused a permanent disability to the appellant. The award was therefore increased from RM13,000 to RM15,000. In respect of the injury of both eye trochlear palsy resulting in double vision at all gaze and loss of depth perception, the learned judge did not consider that the appellant was having problem with his vision, unable to work and unable to have proper interaction with his family. In light of the above, the award by the sessions judge was reviewed from RM15,000 to RM40,000 (see paras 15–16).

(4) With regards to degenerative spine disease L5 and S1, the orthopaedic specialist had confirmed that the appellant suffered from 'Degenerative Spine Disease L1 S1'. In view of this, the appellant could not carry heavy thing, and this would prolong for the whole life. Thus, the award was increased from RM20,000 to RM30,000. As for Left Profound Senorineural Hearing Loss, the learned sessions judge had not fully considered this issue as there was no award given. As such, based on the revised guidelines for awards in personal injury, the court awarded the appellant RM20,000 (see paras 17–18).

(5) The court reviewed the award for lacerations on the left pinna and scalp from RM4,500 to RM7,000. In respect of scars, it was proven that there were multiple healed abrasion scars over hands and knees. In view of this permanent disability, the award was increased to RM10,000. For removal of glass fragment from forehead, based on the report of the medical specialist, there was an operation to remove the glass fragment from the appellant's forehead. For this, the court awarded RM2,000 (see paras 19–21).

(6) The appellant worked as a car sprayer and received an average of RM5,000 monthly, this was supported by exhs P1 and P2 which were never denied by the respondent, however the sessions judge did not take into consideration these exhibits. The sessions judge had wrongly applied the correct principles of multiplier and multiplicand in calculating the appellant's actual income. The calculation should be RM2,800 x 9 x 12 = RM302,400. As such, the court awarded the appellant RM300,000 for loss of actual future earnings. For cost of purchasing viagra for whole life, the court awarded RM100,000 (see paras 22–23).

(7) There was clearly a misdirection of fact and law by the learned sessions court judge which required the court's intervention to put things right

and correct the decision of the lower court. The oral evidence of the appellant's witnesses tested with the contemporaneous documents as well as the respondent's witnesses supported the appellant's pleaded case (see para 25).

[Bahasa Malaysia summary

Rayuan ini berkaitan dengan kuantum ganti rugi yang diawardkan oleh mahkamah sesyen yang memihak kepada perayu yang adalah nyata rendah dan tanpa menimbangkan kecederaan yang dialami oleh mangsa. Perayu menuntut terhadap responden untuk ganti rugi am dan khas atas kecuaian responden dalam mengendalikan satu kenderaan bermotor dengan cara memandu dengan kelajuan yang tinggi dan kemudiannya melanggar perayu semasa dia sedang melintas jalan. Pihak-pihak bersetuju bahawa liabiliti pihak-pihak adalah 50-50. Mahkamah sesysen membenarkan kuantum tersebut atas dasar 100%.

Diputuskan, membenarkan rayuan:

(1) Berkaitan dengan kecederaan kepala yang parah dengan beberapa *intracranial haemorrhage* dan *psychosis post traumatic brain injury* tiada apa-apa dalam penghakiman mahkamah sesyen yang menunjukan hakim mahkamah sesyen telah menimbangkan keseriusan kecederaan yang dialami oleh perayu. Dalam menimbangkan kecederaan dan kecacatan yang pelbagai, mahkamah dengan itu menggantikan awad dengan jumlah RM200,000 dari RM47,000 yang diawadkan oleh hakim mahkamah sesyen (lihat perenggan 9–11).

(2) Hakim mahkamah sesyen tidak memberikan apa-apa awad atas ketidaksedaran dan retrograde amnesia. Setelah merujuk kepada *Revised Compendium of Personal Injury Awards*, mahkamah berpandangan bahawa awad RM5,000 adalah adil dan saksama. Hakim mahkamah sesyen juga tidak memberikan apa-apa awad berkaitan dengan *erectile dysfunction* yang dialami oleh perayu. Mahkamah dalam menimbangkan isu ini mengambil kira bahawa perayu mempunyai enam anak dan berupaya untuk bersetubuh dengan isterinya sebelum kemalangan. Mengambil kira kemalangan tersebut, aktiviti seks perayu dengan isterinya telah dihalang. Kebarangkalian untuk mendapat anak dikurangkan, ianya akan memberi kesan kepada kualiti kehidupan dan kesan psikologi negatif kepada keluarga. Mahkamah oleh itu, mengawadkan RM30,000 untuk *erectile dysfunction* (lihat perenggan 12–13).

(3) Kesan negatif *neorogenic bladder dan constipation* kepada perayu yang mana perayu akan mempunyai masalah untuk melakukan apa-apa kerja. Ini juga menyebabkan kecacatan kekal kepada perayu. Oleh itu, awad

adalah dinaikkan daripada RM13,000 kepada RM15,000. Berkaitan dengan kecederaan *both eye trochlear palsy* yang menyebabkan *double vision* dan semua kehilangan *depth perception*, hakim terpelajar tidak menimbangkan bahawa perayu mempunyai masalah dengan penglihatannya, boleh untuk kerja dan tidak boleh untuk berinteraksi dengan keluarganya. Oleh yang demikian, awad oleh mahkamah sesyen dikaji semula daripada RM15,000 kepada RM40,000 (lihat perenggan 15–16).

(4) Berkaitan dengan *degenerative spine disease* L5 dan S1, pakar ortopedik telah mengesahkan bahawa perayu mengalami penyakit tersebut. Mengambil kira perkara ini, perayu tidak boleh mengangkat benda berat, dan perkara ini akan berlanjutan sepanjang hayat. Oleh itu awad dinaikkan dari RM20,000 ke RM30,000. Berkaitan dengan *left profound senorineural hearing loss*, hakim mahkamah sesyen tidak menimbangkan sepenuhnya isu ini memandangkan tiada awad diberikan. Oleh itu, berdasarkan panduan yang dikaji semula dalam kecederaan peribadi, mahkamah mengawad perayu RM20,000 (lihat perenggan 17–18).

(5) Mahkamah mengkaji semula awad untuk luka di left pinna dan scalp dari RM4,500 ke RM7,000. Berkaitan dengan parut, ianya dibuktikan bahawa terdapat beberapa parut lelasan pada tangan dan lutut. Mengambil kira kecacatan tetap ini, awad ditingkatkan kepada RM10,000, untuk pengeluaran kaca yang bersepai daripada dahi, berdasarkan laporan perubatan doktor pakar, wujud satu pembedahan untuk mengeluarkan kaca dari dahi perayu. Untuk ini, mahkamah mengawadkan RM2,000 (lihat perenggan 19–21).

(6) Perayu bekerja sebagai pengecat kereta dan menerima pendapatan purata RM5,000 setiap bulan. Ini disokong oleh eksh P1 dan P2 yang tidak pernah dinafikan oleh responden, namun hakim mahkamah sesyen tidak mengambil kira ekshibit ini. Hakim mahkamah sesyen telah gagal untuk menggunakan prinsip multiplier dan multiplicand secara betul dalam mengira pendapatan sebenar perayu. Pengiraan septutunya RM2,8000 x 9 x 12 = RM302,400. Oleh itu, mahkamah mengawardkan perayu RM300,000 untuk kerugian pendapatan masa hadapan sebenar. Untuk kos pembelian viagra sepanjang hayatnya, mahkamah mengawardkan RM100,000 (lihat perenggan 22–23).

(7) Adalah jelas bahawa wujud kekhilafan fakta dan undang-undang oleh hakim mahkamah sesyen terpelajar yang memerlikan campur tangan mahkamah untuk membetulkan keputusan mahkamah rendah. Keterangan lisan saksi perayu diuji dengan dokumen semasa dan juga saksi responden menyokong kes yang diplid oleh perayu (lihat perenggan 25).]

Notes

For cases on damages, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1393–1420.

Cases referred to

Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh Beng Guek, litigation representative) [2016] 9 MLJ 238, HC (refd)
Batumalee a/l Masilamani & Anor v Thong Chan Leng & Anor [2003] 4 MLJ 391; [2003] 4 CLJ 95, HC (refd)
Bujang bin Mat & Anor v Lai Tzen Hai & Anor [2004] 6 MLJ 376, HC (refd)
Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors [1990] 3 MLJ 103, SC (refd)
Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor [1997] 5 MLJ 530, HC (folld)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Kerajaan Malaysia v Global Upline Sdn Bhd and another appeal [2017] 1 MLJ 170; [2016] 1 LNS 1158, CA (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 3 CLJ 813, CA (refd)
Lee Chong Keong v Cheang Kok Weng & Anor [1996] 4 MLJ 133, HC (refd)
Seah Yit Chen v Singapore Bus Service (1978) Ltd & Ors [1990] 3 MLJ 144, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 CLJ 429; [1985] CLJ Rep 323, SC (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)
Wong Khang Jong v Ali & Anor [1970] 1 MLJ 56, FC (refd)

Rajes (Veronica with him) (Rajes & Assoc) for the appellant.
Md Sofie (VP Nathan & Partners) for the respondents.

Mohamad Shariff JC:

INTRODUCTION

[1] This is an appeal against the decision of the Klang Sessions Court delivered on 31 October 2017, on the amount of quantum of damages awarded which is manifestly low and without due consideration on the injuries suffered by the victim. It has purely cause a miscarriage of justice in view of the serious injuries suffered by the appellant/plaintiff.

[2] The appellant's/plaintiff's claim against the respondent/defendant for general and special damages due to the respondent's negligence in handling motorcar No WRR 3873 on 20 August 2014, when the plaintiff was crossing

the road from the right to the left, suddenly the respondent while driving at high speed and negligently from Jalan Batu Unjur without giving any signals and signs hit the plaintiff.

[3] Both parties had agreed and recorded the plaintiff's at 50% liability 50% and the respondent at 50% liability. The appellant/plaintiff appeal is merely on the quantum only.

THE SESSION'S JUDGE DECISION

[4] On 31 October 2017, after hearing the appellant's witnesses, the session judge had allowed the quantum on 100% basis as below:

Ganti rugi Am

No	Kecederaan	Awad Mahkamah
a.	Severe head injury with multiple Intracranial haemorrhage & Psychosis	RM47,000.00
b.	Loss of Consciousness and Retrograde Amnesia	Tiada awad
c.	Erectile Dysfunction	Tiada awad
d.	Neurogenic Bladder & Constipation	RM13,000.00
e.	Both Eye Trochlear Nerve Palsy Resulting in Double Vision & Loss of Depth Perception	RM15,000.00
f.	Degenerative Spine Disease	RM20,000.00
g.	Left Profound Senorineural Hearing Loss	Tiada Awad
h.	Laceration on the Left Pinna & Scalp	RM4,500.00
i.	Scars	RM4,000.00
j.	Removal of Glass Fragment from forehead	Tiada Awad

Ganti rugi Khas

No	Tuntutan Plaintif	Awad Mahkamah
a.	Bayaran perjalanan keluarga untuk melawat Plaintif di Hospital Tengku Ampuan Rahimah Klang	Tiada Awad
b.	Bayaran perjalanan bagi Plaintif untuk mendapat rawatan pesakit susulan di HTAR Klang	Tiada Awad
c.	Kerosakkan pakaian/kasut/jam tangan/telefon bimbit dan lain-lain	Tiada Awad
d.	Bil-bil hospital dan rawatan yang masih berlanjutan	Tiada Awad
e.	Laporan perubatan pakar/ carian JPJ/ Polis/ Adjuster	Tiada Awad
f.	Kos pembedahan dan rawatan bagi Plaintif di masa akan datang	Tiada Awad
g.	Kehilangan pendapatan sebenar masa hadapan	RM15,000.00

No	Tuntutan Plaintif	Awad Mahkamah
h.	Kos perubatan/alat-alat ortopedik dan perbelanjaan perubatan lain yang masih berlanjutan	Tiada Awad
i.	Kos membeli alat pendengaran dan alat- alat akesori untuk alat pendengaran masa hadapan	Tiada Awad
j.	Kos membeli ubat 'viagara'	RM14,832.00
k.	Kos membeli cermin mata 'Prism/Fresnel Spectacles with piano leses'	Tiada Awad

A B C D E F G H I

THE COURT'S FINDING

[5] It is trite law based on a number of great authorities, an appellate court should but rarely interfere with the conclusion arrived at by the trial judge who has had the advantage of hearing the witnesses unless it is satisfied that the trial judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered, either due to an omission to consider relevant materials or admitting irrelevant consideration. The cases in reference are *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] 1 CLJ 429; [1985] CLJ Rep 323; *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 3 CLJ 813; and the case of: *Kerajaan Malaysia v Global Upline Sdn Bhd and another appeal* [2017] 1 MLJ 170; [2016] 1 LNS 1158.

[6] In another case of: *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA), Gopal Sri Ram JCA delivering the judgment of the court:

> ... it is trite law that this court will not interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has no fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion ...

[7] The Federal Court decision in *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 (FC), Gill FCJ in delivering the judgment of the court:

> ... As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can be in the true sense compensate for it.
>
> Yet compensation in the form of money is the only way in which he can be granted redress for injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amount awarded

in past cases, which bear reasonable comparison with the case under review, should serve as useful guide.

The general principle is that an appellat e court can only interfere with an assessm ent if it is considered so inordinately low or inordinately high as to make the court exclaim. — *'Good gracious, is that the sum which has been awarded — that sum must be altered'*, or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate ...

Similarly, in the case of: *Wong Khang Jong v Ali & Anor* [1970] 1 MLJ 56 (FC), Ong Hock Thye CH (Malaya) in delivering the judgment of the court:

... The test which an appellate court has to apply in cases of appeal against quantum is that which LJ has expressed in vivid and meaningful language: 'Good gracious me, is this clearly wrong?: see: *Watson v Powless* [1967] 3 All ER 721, 723. In more prosaic terms: 'is this a wholly erroneous estimate? ...

FIRST ISSUE: GENERAL DAMAGES

[8] Upon perusing the notes of evidence and the ground of judgment, as the accident had happened on 20 August 2014, the appellant had suffered serious and permanent injuries. This is clearly from the medical report below:

(a) medical report Otorinolaringologi Department Hospital Tengku Ampuan Rahimah dated 21 July 2015;

(b) medical report Ophthalmology Department Hospital Tengku Ampuan Rahimah dated 25 August 2015;

(c) specialist report Neurosurgeon Dr Dharmendra Ganesan from UM Specialist Centre dated 28 August 2015;

(d) specialist report KC Chu Orthoptik Centre dated 22 September 2015;

(e) medical report Orthopedic Department Hospital Tengku Ampuan Rahimah dated 16 October 2015;

(f) medical report Ophthalmology Department Hospital Tengku Ampuan Rahimah dated 4 December 2015;

(g) specialist report Urologist Professor Azad Hassan Abdul Razack from Surgery Department, Medical Faculty, University Malaya dated 24 January 2016;

(h) medical report Psychiatry Department Hospital Tengku Ampuan Rahimah dated 2 December 2016;

(i) medical report Otorhinolaryngology Department Hospital Tengku Ampuan Rahimah bertarikh 4 December 2015;

(j) specialist report Otorhinolaryngology Dr Prepageran from UM Specialist Centre dated 5 September 2016; and

(k) specialist report Urologist Dr Ong Teng Aik from UM Specialist Centre dated 8 June 2017.

Sub-issue (1): Severe head injury with multiple intracranial haemorrage and phychosis post traumatic brain injury

[9] Having perused the above medical reports, it has come to my view that the appellant has suffered the above injuries due to the respondent's negligence. The learned session judge had awarded RM47,000. From the medical reports at pp 68–75 *rekod rayuan*, in view of the serious head injuries, the appellant was warded at Intensive Care Unit (ICU). At that particular time, the appellant was unconscious, poor Glasgow Coma Scale, intubated and ventilated, CT scan showed minimal subarachnoid bleed in the right frontal parietal region, small intraparenchymal bleed in the right parietal region, subdural bleed in the left subtentorial region with mild right cerebral oedema, bilateral forth nerve palsy, left sided profound sensorineural hearing loss. The appellant had also suffered permanent disability as a result of injuries sustained such as headaches periodically, forgetfulness, insomnia. Lethargy, loses temper easily, expressive difficulties, left ear has significantly reduced hearing, unable to use the telephone, visual aberration unable to gauge depth, impaired peripheral visual field, double vision, psychosis post traumatic brain injury, lethargy, temperamental, impairment in the immediate and short term memory, risk of late onset post traumatic epilepsy, difficulty to express himself with the right words, unable to enjoy his usual recreational activity ie playing badminton and unable to return to work.

[10] At pp 68–75 *rekod rayuan*, the neurologist specialist, Dr Dharmendra Ganesan had determined the appellant's condition and both parties had agreed as below:

— He complains of headaches, forgetfulness, lethargy and temperamental,

— The neurocognitive assessment revealed impairment in the immediate and short term memory. These symptoms are part of post concussive syndrome. Considering the severity of the injury and the duration, these symptoms are most probably permanent.

— He runs risk of late onset post traumatic epilepsy due to the severe head injury and multiple intracranial hemorrhages.

— He has difficulty to express himself with the right words. This is consistent with injury to the dominant speech centre of the brain, which typically is the left inferior frontal lobe. This most probably would be a permanent disability, considering the duration since the accident.

— The head injury has resulted in the gentlemen having bilateral fourth nerve palsy. This has affected the synchronous eye movement. At a consequence, he has double vision at all gaze.

— He finds it difficult to gauge depth as well as he suffers from impaired peripheral visual field. This is most probably a permanent deficit.

— He would need to see an ophthalmologist and optometrists to prescribe corrective lenses to diminish the double vision.

— He has significant reduction of hearing in the left ear. He is not on able to use the telephone on that ear. Audiogram on the 23 December 2014 has established the fact that he has left sensorineural hearing loss. This is most probably a permanent disability.

— He has several scars on various parts of his body directly related to the accident example. Left ear, scalp, dorsum aspect of both hand, both knees and left flank. These scars are permanent blemish on the skin.

[11] At pp 96–97 *rekod rayuan*, Specialist Report Dr Charlie Siah Cha Hern the plaintiff had suffered psychosis post traumatic brain injury and elaborated as below:

— According to available medical records, patient was first seen on 8.09.2016. He had history of motor vehicle accident (pedestrian vs motorcar, sustained head injury, required ICU admission).

— Since then he had visual hallucination, associated with irritability and poor sleep on and off.

— Symptoms worsened 2 months prior presentation, whereby patient had difficulty to control his anger, started breaking hand phone and household items.

— He was diagnosed as psychosis post traumatic brain injury.

He is maintained with T Risperidone lmg ON and T Vitamin B Complex 1/1 OP.

Having stated the above, to my mind there is nothing in the judgment of the session judge had taken such consideration *hakim* and the seriousness of the injuries sustained by the appellant. In considering these injuries and in guiding this court, I am in agreement with the judgment in the case of: *Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor* [1997] 5 MLJ 530, Mohd Noor Ahmad J held that:

... In determining the award, the proper approach was to consider the nature of the mental illness, its effects on the plaintiff and also the personality and intellectual capacity and the potential he had demonstrated before the accident and on the onset of his mental illness in 1987. An award of RM110,000 for the plaintiff ...

The Court of Appeal had reinstated the session's court award in the case of: *Ang Yee Cheng & Anor v Ang Siang Hock (person under disability suing through Koh*

Beng Guek, litigation representative) [2016] 9 MLJ 238, the court had awarded RM300,000 for brain injuries as stated:

> ... Head injury — brain contusion and left front parietal acute subdural haematoma with cerebral oedema ...
>
> ... The Plaintiff as a result suffers from brain damage, severe neurological disabilities, severe speech impairment, post traumatic encephalom alacia of the brain, post traumatic epilepsy, inability to move the right upper limb, weakness of the right lower limb or right hemiparesis and requires assistance for daily living activities ...

In considering the brain injuries and permanent disability as above, the appellant was only 37 years of age, sole breadwinner of six children's, in view of these injuries the appellant cannot perform any work, would definitely affected their source of income. Above all, the appellant would become aggressive and violent without controlling himself had emotionally disturbed. The appellant had to undergo the whole life treatment especially psychiatry, viewing, hearing, erectile dysfunction and neurogenic bladder and constipation. *It is my considered view that the award be substituted with the amount of RM200,000.*

Sub-issue (2): Loss of consciousness and retrograde amnesia?

[12] The learned session judge did not award anything on this. At p 72 *rekod rayuan*, the neurologist specialist report had maintained that the appellant was unconscious when first brought to the hospital. He has lost memory due to the accident occurred. The neurologist has described the following:

> ... the neurocognitive assessm ent revealed deficit in the immediate and short term memory ...

Having referred to the *Revised Compendium of Personal Injury Awards* prepared by the task force to review compendium of personal injury awards Bar Council Malaysia, *to my mind the award of RM5,000 would be fair and justifiable in view of the appellant had not only suffered loss of consciousness but also retrograde amnesia*.

Sub-issue (3): Erectile dysfunction?

[13] It is to note that before the accident occurred, the appellant had six children and had good affairs with the wife. Nevertheless, due to the accident the appellant is unable to perform sexual intercourse with his wife. At pp 57–59 *rekod rayuan*, the specialist report urologist Professor Dr Azad Hassan Abdul Razak had stated that:

> — He has problem with erection since that accident

— He has not noticed any nocturnal or early morning erection.

— He is unable to have sexual intercourse, as his erection is not hard enough.

— In view of this he has not attempted any sexual activity over the past one year, although he still has a normal libido.

— His sexual activity is also restricted by the pain in his left hip.

— His International Index of erectile function -5 (IIEF-5) is 10 indicating moderate degree of erectile dysfunction (ED).

— The other problem is with regard to his erectile function. He had moderate degree of ED based on the IIEF-5 score. His ED is likely tobe permanent. He will require medical treatment to be sexually active.

— He still continues to have ejaculation but is not present all the time during his sexual activity.

— His ability to impregnate his wife will also be reduced compared to prior to the accident.

The learned session judge did not award anything on this. In considering this issue I would have note on several issues namely, the appellant had six children and was able to have sexual intercourse with his wife before the accident. In view of the accident, the appellant poor erection after the accident, penile erection hardness was reduced, he experienced 'shortness of breath' with sexual intercourse, ejaculation could be achieved occasionally, but the sensation of orgasm was diminished and his sexual activity is also restricted by the pain in his hip. The chances of getting child would be diminished, it would definitely affect the quality of life, the negative psychological impact on the family and this would cause a permanent disability according to the specialist. *As such, I would award erectile dysfunction of RM300,000.*

Sub-issue (4): Neurogenic bladder and constipation?

[14] At pp 57–59 *rekod rayuan*, according to the appellant's urologist report, Professor Azad Hassan Abdul Razack had confirmed that the appellant having problem the following:

— He opens his bowels once a week.

— He has problems with micturition. He has frequency and voids about 1–2 times per hour.

— He has also noted urgency where he has to rush to toilet immediately when he has the urge.

— This patient sustained a very severe head injury after the RTA. Based on the report from neurosurgeon he still has some residual effects of the injury present and is likely to be permanent.

— His main urological problems are bladder over activity and ED. The problem of bladder over activity is secondary to the head injury sustained.

— The main central nervous system control of bladder is inhibitory in nature to ensure coordinated micturition at the appropriate time.

— There will be loss of this inhibitory function after the severe head injury suffered by this patient resulting in frequency and urgency of micturition.

— It is best to do an urodynamics study to confirm this. It is very likely that the patient will require antimuscuranics or B3 agonist to control the over active bladder.

— This problem is likely to be permanent and he will require lifelong treatment. It he does not respond to the oral medication and if the over activity is confirmed by urodynamics, he might require regular botulinium toxin A injection to the bladder to control his symptoms.

[15] Similarly, at pp 112–118 *rekod rayuan*, the respondent's urologist Dr Ong Teng Aik in his report had confirmed:

— His urine flow rate was slow, especially after he held his bladder for too long. Nocturia was also a problem, as he needed to wake up 5–6 times at night to pass urine.

— Uroflow measurement showed an obstructive flow pattern.

— The maximum flow rate [Qmax] was 11.8 ml/s, with a voided volume of 192ml.

— The patient might benefit from urology follow-up and medication [example: alpha blocker] to manage his lower urinary tract symptoms.

In view of the above, the neorogenic bladder and constipation would definitely caused negative impact to the appellant and having problem to perform any work. This had also caused a permanent disability to the appellant. *In view of this, the award by the session judge is to be increased from RM13,000 to RM15,000.*

Sub-issue (5): Both eye trochlear nerve palsy resulting in double vision at all gaze and loss of depth perception?

[16] At pp 76–77 *rekod rayuan*, the medical report of Dr Ng Lav Hui stated that the appellant has diplopia in medial and lateral gaze. Both eyes trochlear nerve palsy secondary to severe brain injury. At pp 68–75 *rekod rayuan*, the neurologist, Dr Dharmendra Ganesan in his specialist report indicated below:

— Visual aberration, unable to gauge depth, impaired peripheral visual field, double vision.

— The visual aberration resulted in slowness in most activity such as eating, reading papers, etc.

— Visual activity within normal range, diminished peripheral visual field on confrontation, diplopia at all gaze.

— The head injury has resulted in the gentleman having bilateral fourth nerve palsy.

— This has affected the synchronous eye movement

— As a consequence he has double vision at all gaze.

— He finds it difficult to gauge depth as well as he suffers from impaired peripheral visual field.

— This is most probably permanent deficit.

The orthoptic specialist, KC Chu in his report at pp 63–65 *rekod rayuan* stated as follow:

— Bilateral Superior Oblique Palsies/Bilateral 4th Cranial nerve palsies. Tight being more affected.

— Components of diplopia elicited are horizontal, vertical and with some degree of Excyclotorsion measured.

— The degree of deviation varies depending on his position of gazes.

— With the presence of diplopic images he finds difficulty in his daily activities.

— I have advised him to be more careful especially when going down the stairs, stepping over drains and in general walking around due to the disruption of his Binocular Single Vision (BSV).

— The loss of BSV results in, inability to gauge depth perception.

— The lack of depth perception means he is not suitable to drive and may affect his job performance.

At pp 60–61 *rekod rayuan*, the oftamologist specialist, Dr Indira Nadras in her report stated that:

— There was presence of diplopia in every gaze except primary gaze.

— He was treated conservatively.

— Orthoptic Assessment with investigative results confirmed Bilateral Superior Oblique/4th cranial nerve palsies with right more affected than left. Diplopia was elicited in all gazes but varies in degree of deviation depending on his position of gaze.

— In the presence of diplopia and loss of binocular single vision, he has difficulty in daily activities.

— He also has difficulty to judge depth perception which will make him difficult to drive and affect his job performance.

In view of the learned session judge did not consider the appellant having problem with his vision and unable to work and proper interaction with the family, *the award by the session judge be reviewed from RM15,000 to RM40,000*.

Sub-issue (6): Degenerative spine disease L5 and S1?

[17] The orthopedic specialist, Dr Ruban Sivanoli in his report at p 62 *rekod rayuan* had confirmed that the appellant suffered from 'Degenerative Spine Disease L1 S1'. In view of this, the appellant could not carry heavy thing and this would prolong for the whole life. *The award by the session judge should be increased from RM20,000 to RM30,000*.

Sub-issue (7): Left profound senorineural hearing loss?

[18] At pp 78–79 *rekod rayuan*, otorinolaringologoi specialist, Dr Tang Phing Phing in his report stated that:

> ... Patient was scheduled for formal hearing assessm ent on 23/12/2014 which showed normal hearing on the right ear and left side profound sessorineural hearing loss based on Pure Tone Audiometry.

It is also supported by the neurologist report, Dr Dharmendra Ganesan at pp 68–75 *rekod rayuan* as follows:

> — He has significant reduction of hearing in the left ear. He is not able to use the telephone on that ear.
>
> — Audiogram on the 23/12/2014 has established the fact that he has sensorineural hearing loss.
>
> — This is most probably permanent disability.

At pp 102–107 *rekod rayuan*, the respondent's specialist, Dr Prepageran in his report:

> ... On assessm ent of hearing, turning fork examination revealed right positive Rhine and left Rhine no response.
>
> Weber Central while Free field voice test indicated the ability to hear whisper from 2 feet and no response on the left ...

To this effect, I hardly find that the learned session judge had fully considered this issue when no award was given to the appellant. As such, *based on the revised guidelines for awards in personal injury, I award the appellant RM20,000*.

Sub-issue (8): Lacerations on the left pinna and scalp?

[19] At pp 78 and 79 *rekod rayuan*, Dr Tang Phing Phing recorded in his report:

— Laceration wound seen over left pinna and scalp.

— Toileting and suturing was done by ENT team on 20/8/2014.

Similarly, in the neurologist specialist report, Dr Dharmendra Ganesan had recorded:

— Laceration scar on the left ear.

— There is a scalp lump about 4cm in diameter at the left temporal region of the scalp.

In furtherance, at pp 68–75 *rekod rayuan*, Dr Shashi Gopalan a/l Marimuthu in his report:

— Laceration wound seen over left pinna and scalp region.

— Bilateral EAC was cleared with intact tympanic membrane.

The session's judge award is reviewed from RM4,500 to RM7,000.

Sub-issue (9): Scars?

[20] The neurologist specialist, Dr Dharmendra Ganesan in his report at pp 68–75 *rekod rayuan*:

— Laceration scar on the left ear.

— Abrasion scar on dorsum of hands and knees.

— Abrasion scar on the left flank.

This was also confirmed by the medical report, Professor Azad Hassan Abdul Razack at pp 57–59 *rekod rayuan* that there were multiple healed abrasion scars over hands and knees. *In view of this permanent disability, I awarded the appellant's claim to RM10,000.*

Sub-issue (9): Removal of glass fragment from forehead?

[21] Based on the respondent's medical specialist, Dr Prepageran from UM Specialist Centre in his report at pp 102–107 *rekod rayuan*, there was an operation to remove the glass fragment from the appellant's forehead. Nevertheless the session judge did not consider this issue and no award made to the appellant. *As such I award the appellant with RM2,000.*

Learned counsel for the respondent had argued that there were overlapping in the appellant's claim and there should be 10% deduction from the amount claimed. With respect, in the case of: *Seah Yit Chen v Singapore Bus Service (1978) Ltd & Ors* [1990] 3 MLJ 144, the court held that:

> ... where injuries sustained are related to same part or function of body there should be only one award, but if injuries are to different parts of body and affect different functions then it is appropriate to make separate award for each head of damage ...

Having considered every aspect of the case, to my mind the issue of overlapping forwarded by the respondent's counsel is without merit and justification.

SECOND ISSUE: SPECIAL DAMAGES

On the issue of special damages, I will confined on two sub-issues namely:

(a) loss of actual future earning; and

(b) cost of purchasing 'Viagara'

Sub-issue (1): Loss of actual future earning

[22] The learned session judge did not allowed any special damages as claimed by the appellant. The learned judge only award RM15,000 for this sub-issue. The appellant claimed for RM540,000. In (SP1) evidence, who worked as accounts clerk at Shah Alam Tyres & Auto Accessories Sdn Bhd had confirmed that the appellant worked as car sprayer at the company. Before the accident happened, the appellant had received commission at an average of RM5,000 monthly salary. Nevertheless the company did not pay further monthly salary or commission after the accident as the appellant did not come to work. Letter from the employer was tendered as exh (P1) and cash payment voucher was tendered as (P2). These two exhibits were never denied by the respondent but the session judge did not even take into consideration as the appellant's salary and payment voucher. I hardly find any reasons forwarded by the session judge in his grounds of judgment as to how he gets the multiplier (RM1,500) and multiplicand (ten months) in order to award RM15,000. The appellant was only 37 years old, and the multiplier would be:

> 55-37/2 =18/2= 9 tahun

Having had the accident, the appellant could not be able to work as car sprayer. I have taken note of the specialist report, KC Chu Orthoptik Centre at pp 63–65 *rekod rayuan* as follows:

> ... e) With the presence of diplopic images he finds difficulty in his daily activities. I have advised him to be more careful especially when going down the stairs, stepping over drains and in general walking around due to the disruption of his

A Binocular Single Vision (BSV).The loss of BSV results in, inability to gauge depth perception. The lack of depth perception means he is not suitable to drive and may affect his job performance ...

At pp 60–61 *rekod rayuan*, medical report Ophthalmology Department Hospital Tengku Ampuan Rahimah stated that:

B

... In the presence of diplopia and loss of binocular single vision, he has difficulty in daily activities. He also has difficulty to judge depth perception which will make him difficult to drive and affect his job performance ...

C Based on the medical reports above, I have also considered the case of *Lee Chong Keong v Cheang Kok Weng & Anor* [1996] 4 MLJ 133, Chen Fook Yen J held that:

... In assessing general damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to continuing or permanent disability. The trial judge has not misdirected himself even with the scanty medical report regarding the loss of earning capacity. Being a manual worker, the plaintiff had undoubtedly suffered a set-back for life, especially with some wasting of the right forearm muscles and shortening of the leg concerned. Therefore the award of RM12,600 was not unwarranted and the appeal should not be allowed ...

D

E

The Supreme Court decision in the case of: *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 (SC), the Supreme Court held that:

F ... The appellant is entitled to be compensated for her loss of earning capacity. There was evidence that she was earning $ 1270 per month. There was also evidence that after the accident she was practically a vegetable and would have to be nursed for the rest of her working life ...

Similarly, in the case of: *Batumalee a/l Masilamani & Anor v Thong Chan Leng & Anor* [2003] 4 MLJ 391; [2003] 4 CLJ 95, Suriyadi J held that:

G

... From the facts it was crystal clear that he was most comfortable in his mother tongue, and as reflected by the job he held, he was not a highly educated man; from the other evidence his physical strength was his only asset to pep up his monthly income. And now he is debilitated by physical afflictions.

H ...

With his antecedents and background ... I am unable to pinpoint any job the appellant could take up, that does not require physical strength. His inability to squat fully or stand on his right leg without too long ,a limitation of flexion of the right knee joint, a patella distorted with the loss of congruity, a generalized wasting of his right lower limb, and walking with a mild limp which were clearly docum ented in the specialist reports how could he?

I

...

Expecting him to become an Amway salesman overnight, with such a poor educational background and lack of language and selling skill is a desperate act on

> the part of the defendant to impose the impossible on the appellant. Possibilities based on speculation are there, but we are a living in a real world where probability is the yardstick ...

Based on the above authorities, it is my considered view that the learned session judge had wrongly applied the correct principles of multiplier and multiplicand in calculating the appellant's actual income. *The calculation should be: RM2,800 x 9 x 12 = RM302,400. As such, I would allow and award the appellant RM300,000.*

Sub-issue (2): Cost of purchasing 'Viagara' for whole life?

[23] As the appellant had suffered serious injuries, he has to consume 'Viagara' medication for whole life for having sexual intercourse with his wife. At pp 57, 58 and 59 *rekod rayuan*, the plaintiff's urologist specialist Professor Azad Hassan Abdul Razack had suggested the following treatments and medication for appellant's 'erectile dysfunction', namely:

> ... The other problem is with regards to his erectile function. He has moderate degree of ED based on the IIEF-5 score. His ED is likely to be permanent. He will require medical treatment to be sexually active.
>
> The options of treatment include Oral PDE5 inhibitors, prostaglandin injection, vacuum device or penile implant in that order. The cost of the treatment is as follows:
>
> 1. PDE5 Inhibitors will cost around RM100.00 per week
> 2. Prostaglandin injections will cost around RM150.00 to RM200.00per week
> 3. Vacuum device will be one off cost around RM1,000.00 with possible replacem ent once or twice in a life time.
> 4. Penile implant will be one off cost around RM25,000.00 ...

Similarly, the defendant's urologist specialist, Dr Ong Teng Aik in his report at pp 112–118 *rekod rayuan*:

> ... The patient will benefit from the use of Phosphodi eterase 5 Inhibitors [PDE51] (example: Viagara, Levitra or Cialis). The cost of PDE51 at the current market price is about RM50 per/tablet. Recently, generic 'Viagara' ie sildenafil is available to the Malaysian market. The cost is about RM15.00 per tablet. The patient might need one or two tablets per week [first line therapy].
>
> If the patient failed to respond to PDE51 inhibitors he would be put on a trial of intracavernosal injection of Caverjet [prostaglandin El] [estimated cost: RM120/Caverjet, twice a week] or vacuum pump (estimate cost: RM6,000.00 per device). These are 2nd line therapy.
>
> If the above measures fail, implantation of penile prosthesis would be the last option [estimated cost: RM30,000.00 for the device) (3rd line therapy) ...

In the case of: *Bujang bin Mat & Anor v Lai Tzen Hai & Anor* [2004] 6 MLJ 376 at p 393, Clement Skinner J held that:

> ... [50] I would accordingly allow the appeal against the award for the second period of 27 years and vary the award for costs of post trial future nursing car of RM588,000 made by the learned sessions court judge in respect of the first plaintiff in the following manner:
>
> | | |
> |---|---|
> | Life expectancy | 69.4 years |
> | Age at time of trial | 22 years |
> | | 47 years (rounded off) |
> | Less 1/3 for contingencies | 16 years |
> | | 31 years |
>
> Cost for nursing care for 31 years:
> 31 x 12 x RM 1,500 = RM558,000
> To summaries:
> For pre-trial costs of nursing care RM26,000
> For post-trial cost of nursing care RM558,000

Based on the above case, the calculation would be:

> [72 tahun - 37 tahun] = [35 tahun - 1/3] = 23.3 tahun

As the cost for purchasing viagara is RM150 for a week or RM7,200 for one year, the cost would be:

> RM7,200.00 x 23.3 tahun = RM167,760.00

As such, I would award the appellant for RM100,000.

CONCLUSION

[24] Having perused the written submission by both parties, it is pertinent to note the case of: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), Steve Shim CJ (Sabah and Sarawak) (as His Lordship was) in delivering the judgment of the court:

> ... The Court of Appeal had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.* This was consistent with the established 'plainly wrong' test. Therefore, there was no merit in the appellants' contention that

the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established 'plainly wrong' test consistently applied by the appellat e courts in this country ...

[25] *In view of the court's finding of facts, it is my considered view that there is clearly a misdirection of fact and law by the learned session court judge which requires this court's intervention to put things right and correct the decision of the lower court: I could not resist to state that the oral evidence of the appellant's witnesses tested with the contemporaneous documents as well as the respondents' witnesses did support appellant's/plaintiff's pleaded case. In the light of the foregoing and in the upshot, I allow the appeal and reverse the session judge's decision. The summary of the award as follows:*

Ganti rugi Am

No.	Kecederaan	Award Mahkamah Sesyen	Award Mahkamah Tinggi
a.	Severe head injury with multiple Intracranial haemorrhage & Psychosis	RM47,000.00	RM200,000.00
b.	Loss of Consciousness and Retrograde Amnesia	Tiada awad	RM5,000.00
c.	Erectile Dysfunction	Tiada awad	RM30,000.00
d.	Neurogenic Bladder & Constipation	RM13,000.00	RM15,000.00
e.	Both eye Trochlear Nerve Palsy Resulting in Double Vision & Loss of Depth Perception	RM15,000.00	RM40,000.00
f.	Degenerative Spine Disease	RM20,000.00	RM25,000.00
g.	Left Profound Senorineural Hearing Loss	Tiada awad	RM20,000.00
h.	Laceration on the Left Pinna & Scalp	RM4,500.00	RM7,000.00
i.	Scars	RM4,000.00	RM10,000.00
j.	Removal of Glass Fragment from forehead	Tiada awad	RM2,000.00

Ganti rugi Khas

No.	Tuntutan Plaintiff	Award Mahkamah Sesyen	Award Mahkamah Tinggi
a.	Kehilangan pendapatan sebenar masa hadapan	RM15,000.00	RM300,000.00
b.	Kos membeli ubat 'viagara'	RM14,832.00	RM100,000.00

Appeal allowed.

Reported by Izzat Fauzan